INTERIOR BOARD OF INDIAN APPEALS

Jay Magness v. Albuquerque Area Director, Bureau of Indian Affairs

25 IBIA 65 (12/06/1993)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

JAY MAGNESS
v.
ALBUQUERQUE AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 92-209-A Decided December 6, 1993

Appeal from a determination that an oil and gas development agreement had expired by its own terms for failure to produce in paying quantities.

Affirmed.

1. Indians: Contracts: Generally--Indians: Mineral Resources: Oil and Gas: Generally--Oil and Gas Leases: Expiration

When an oil and gas development agreement entered into under the Indian Mineral Development Act, 25 U.S.C. §§ 2101-2108 (1988), provides that it remains in effect after its initial term as long as oil and/or gas is produced in paying quantities, it expires by its own terms when production in paying quantities ceases.

APPEARANCES: Jay Magness, pro se; Robert C. Eaton, Esq., Office of the Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Area Director; Thomas H. Shipps, Esq., Durango, Colorado, for the Southern Ute Indian Tribe.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Jay Magness 1/ seeks review of a June 8, 1992, decision of the Albuquerque Area Director, Bureau of Indian Affairs (BIA; Area Director) , finding that a minerals agreement between appellant and the Southern Ute Indian Tribe (Tribe) had expired by its own terms for lack of production in paying quantities. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Background

On June 1, 1984, appellant and the Tribe entered into a memorandum of understanding concerning the development of a minerals management agreement.

1/ Appellant's notice of appeal indicates that it was filed "on behalf of Jay Magness, J. Magness Inc., and all other assignees and interest owners in the captioned property" (Notice of Appeal at 1). In the absence of any identification of "other assignees and interest owners," the Board treats this appeal as having been filed by appellant for himself alone.

This agreement was to be executed under the authority of the Indian Mineral Development Act of 1982, 25 U.S.C. §§ 2101-2108 (1988) (Development Act). A proposed agreement was presented to the Tribal Council on September 15, 1984, and was approved on January 29, 1985. Minor changes were made to the agreement after review by the Area Director, the Department's Field Solicitor, and the Bureau of Land Management (BLM). The agreement was ultimately signed by the parties, and was approved by the Superintendent, Southern Ute Agency, BIA (Superintendent), on January 31, 1986. This agreement, which was designated Southern Ute Minerals Agreement MOO-C-1420-4435 (Agreement), is the subject of this appeal.

Under the Agreement, the Tribe leased 960 acres, more or less, of tribally owned land in secs. 12, 13, and 14, T. 34 N., R. 7 W., New Mexico Principal Meridian, La Plata County, Colorado, to appellant to explore for and develop oil, gas, natural gasoline, and related hydrocarbons from the surface to a depth equal to the stratographic equivalent of 100 feet below the base of the Dakota Formation. Individual allottees owning an interest in certain lands consisting of approximately 320 acres in sec. 14 were also given the option of participating under the tribal Agreement.

Section 6.1 of the Agreement provided that appellant was to drill and complete 3 wells within 150 days of approval of the Agreement. If any of those wells, or any others drilled, proved to be capable of producing in paying quantities, section 11.1 required appellant to bring that well into actual production in paying quantities within a maximum of 3 years from the completion of the well. Under section 17.1, failure to fulfill timely the requirements of sections 6.1 and 11.1 would result in the affected acreage reverting to the Tribe or allottee(s), and ceasing to be covered by the Agreement. Section 17.1 also provided that "[f]or contract acreage located within a drilling or spacing unit in which a producing well is located, the term of the Agreement shall continue for so long as oil or gas is produced in paying quantities."

The administrative record reveals that the relationship between the Tribe and appellant has not been smooth. By letter dated November 7, 1988, the Superintendent informed appellant that the Agreement was cancelled. Appellant appealed this decision to the Area Director and requested a hearing. A hearing was scheduled, but was postponed based on a January 10, 1989, letter from the Tribe to the Superintendent. The letter stated:

> [W]e request that the November 7, 1988, notice of revocation be suspended and that the Minerals Agreement be deemed valid and in good standing provided the following conditions are met:
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> 1. The sale of the Magness Minerals Agreement to the undisclosed principal [who was then negotiating to purchase the agreement] be closed no later than March 22, 1989.

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2/ All further references to the United States Code are to the 1988 edition.

2. Bonding in an amount specified by the BIA securing performance by J. Magness, Inc. be in place prior to March 22, 1989.

3. The communitization agreements needed to pool production on existing drilling units and to allocate revenues from said units be submitted to the [BIA] in a form acceptable to the Tribe prior to March 22, 1989.

Should any of the three above-stated conditions not be met by March 22, 1989, then the Tribal Council would urge reinstatement of the cancellation order of November 7, 1988, as well as the appellate procedures presently scheduled for January 18, 1989.

Appellant concurred in the Tribe's request. By letter of January 30, 1989, the Superintendent informed the parties that the hearing was being postponed, and the Agreement was reinstated "as unencumbered, in good standing, and valid for conveyance purposes." The Superintendent stated that reinstatement was specifically conditioned on satisfaction of the three conditions set forth in the Tribe's January 10, 1989, letter. He ended: "Should any of these conditions fail to be satisfied, then the hearings will be continued on March 24, 1989."

Apparently appellant made progress toward satisfying the Tribe's conditions, although not all conditions were met by March 22, 1989. In a letter to appellant dated April 28, 1989, the Superintendent stated that "recognizing that progress has been adequate for the present lease monitoring purposes, and that there has been sincere diligence in responding to the owner's wishes on the lease, I hereby rescind the cancellation notice and the hearings."

One of the conditions that was not met by March 22, 1989, was the sale of the Agreement. It appears that the potential purchaser was Bowen/Edwards Associates, Inc. (BEA), who was the designated operator at that time.

Problems continued. On October 16, 1991, the Superintendent requested from BLM a production in paying quantities report for the lands covered by the Agreement. He stated that none of the wells appeared to be producing, and that he had received a letter from the Minerals Management Service (MMS) which indicated that royalties had never been paid to allottee-owners. The Superintendent further stated that after meeting with the Tribe concerning the allottee problems, the Tribe agreed that cancellation procedures should be initiated.

On November 5, 1991, BEA tendered to the Tribe a check in the amount of $12,800, indicating that the payment was a "shut-in royalty payment." On November 18, 1991, BEA informed persons concerned with the Agreement that it had "agreed to contract operate [the Agreement] while attempting to acquire the wells and acreage. Unfortunately, we were not successful. This letter is to notify you that BEA hereby resigns as Contract Operator and is ceasing its acquisition activities."

By letter dated January 9, 1992, the Tribe returned $12,800 to BEA. The Tribe stated: "The negotiation of [BEA's] check was inadvertent and was in no way intended to indicate acceptance by the Tribe of the payment of shut-in royalty on" the Agreement.

On January 21, 1992, the Superintendent informed appellant that the Agreement had expired by its own terms for failure to produce in paying quantities. The letter stated:

> This office has determined that there has been no commercial production from the acreage covered by the [Agreement] from December 1990 through the present. This determination is based on a review of [MMS] forms * * * as well as tribal severance tax records, and comes after consultation with the [BLM].
>
> The duration of the * * * agreement, approved January 31, 1986, was for one hundred and fifty (150) days from the date of approval and "as much longer thereafter as oil and/or gas is produced in paying quantities." During the extended term of such agreements, production in paying quantities is required on a continuous basis. Therefore, production in paying quantities is considered to have ceased prior to December 1990. This decision is also based on [BLM's] records.
>
> The absence of production on the referenced lease requires this office to conclude that the agreement has expired by its own terms due to the lack of production. You are hereby notified that said agreement has expired and that operations conducted by you, your agents or employees on said premises should cease immediately upon receipt of this notice.

(Letter at 1).

Appellant appealed this decision to the Area Director, who affirmed it on June 8, 1992. The Area Director stated:

> The facts in this case clearly indicate (and apparently you do not dispute) that there was no production from the contract acreage from December 1990 through November 1991. The lack of production from the contract acreage for a full year requires us to conclude that the Agreement expired by its own terms.
>
> In a letter to the BIA Superintendent dated March 6, 1992 (the same date as your notice of appeal to this office), you requested that the Superintendent rescind his letter of January 21, 1992. In the letter you stated that on November 5, 1991, [BEA], your designated operator, tendered to the Tribe a shut-in royalty payment in the amount of $12,800. Presumably that payment was for the period of December 1990 through November 1991. You further stated that "[t]he lease had gas production during the month of December 1991." Your argument appears to be that the payment of

> the shut-in royalty kept the Agreement alive until December 1991, when you resumed production for a single month.
>
> Article XI of the Agreement governs the payment of shut-in royalties. [3/] Section 11.1 requires that within three years from the date of completion of an exploratory well capable of production in paying quantities, the developer "shall . . . bring said well into a status of actual production in paying quantities." Section 11.2 permits the Developer to pay shut-in royalties, and thus prevent the Agreement from expiring, only during that three-year period.
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> * * * [T]he shut-in royalty clause was not applicable after June 1, 1990, and the shut-in royalty payment tendered by [BEA] in November 1991 did not keep the Agreement alive. We note that the Tribe returned the payment to [BEA] by letter dated January 9, 1992.

Appellant appealed this decision to the Board. Several extensions of time were granted based on appellant's statements that settlement negotiations were in progress. Following objections to further extensions of time by BIA and the Tribe, both of whom indicated that no negotiations were in progress, appellant filed an opening brief. The Area Director filed an answer brief. No other briefs were filed.

Discussion and Conclusions

Appellant raises five arguments on appeal. Summarized, these arguments are: (1) the Tribe required information from appellant that was not required from other operators, designated a replacement operator who was not capable of managing the property, interfered with planned development because of "Indian trouble," and in general was responsible for the problems because of inadequate management; (2) the shut-in royalty provision is ambiguous, and payment under that provision was tendered and accepted; (3) the wells were produced in December 1991; (4) the Tribe was inconsistent in its monitoring of the Agreement, and a "special relationship" existed between the Tribe and BEA which, appellant asserts, must be examined in an evidentiary bearing; and (5) appellant is being deprived of his investment because he "did not play the politics of the tribe/BIA management group" (Oening Brief at 2). Appellant asks for an evidentiary hearing and/or an investigation, and for the opportunity to hire an outside operator and restore the wells to production. In addition, by letter dated September 22, 1993, appellant asked the Board "for authority to require depositions from parties who represented the * * * Tribe and the BIA during their administration" of the Agreement, so that this information would be available if his request for an evidentiary hearing was denied. 4/

3/ Section XI of the Agreement in quoted in text infra.

4/ This last request was taken under advertisement by order dated Sept. 28, 1993. Based on the Board's disposition of this matter, appellant's motions for an evidentiary hearing, an investigation, and authority to take depositions are denied.

Appellant does not dispute that there was no production in paying quantities under the Agreement from December 1990 through November 1991. The Board has previously held that unexcused cessation of production on leases under the Indian Mineral Leasing Act, 25 U.S.C. §§ 396a-396g (Leasing Act), results in the expiration of those leases by their own terms. See Benson-Montin-Greer Drilling Corp. v. Albuquerque Area Director, 21 IBIA 88, 98 I.D. 419 (1991), aff'd sub nom. Benson-Montin-Greer Drilling Corp. v. Lujan, No. CIV 92-210 SC-LFG (D.N.M. Jan. 13, 1993), appeal pending sub nom. Benson-Montin-Greer Drilling Corp. v. Babbitt, No. 93-2044 (10th Cir.); Mobil Oil Corp. v. Albuquerque Area Director, 18 IBIA 315, 97 I.D. 215 (1990), appeal pending sub nom. Mobil Oil Corp. v. Babbitt, No. CIV 92-N-1039 (D. Colo.).

[1] The Agreement at issue here, although entered into under the Development Act, specifically stated in section 17.1 that, following the 150-day exploration and 3-year development periods, "[f]or contract acreage located within a drilling or spacing unit in which a producing well is located, the term of the Agreement shall continue for so long as oil or gas is produced in paying quantities." 5/ This language is analogous to that in leases under the Leasing Act, and is standard language in oil and gas leases in general. Appellant has presented no reasons why this language should be interpreted differently in agreements entered into under the Development Act, and the Board is aware of none. Accordingly, it holds that when an oil and gas agreement entered into under the Development Act provides that its term extends as long as oil and/or gas is produced in paying quantities, the agreement, if in its extended term, expires by its own terms when production in paying quantities ceases.

Appellant's arguments 1, 4, and 5 suggest that he believes his nonproduction should be excused because of Tribal actions. In all of these vague and general allegations, appellant fails to show how any of the alleged

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5/ Section 17.1 provides in its entirety:

"The primary term of this Agreement shall be one hundred fifty (150) days from the date of approval of the Secretary of Interior or his authorized designate, said one hundred fifty (150) days to commence running no sooner than June 1, 1985. At the conclusion of the primary term of this Agreement, any tribal or allotted contract acreage which is not included in a drilling or spacing unit on which a well capable of producing in paying quantities is located shall revert to the Tribe and shall be deemed no longer contributed acreage pursuant to this Agreement. In regard to any drilling or spacing unit in which tribal or allotted contract acreage is located, should Developer fail to establish actual production in paying quantities within three years from the date of completion of the initial well drilled in said unit in compliance with provision 11.1, said contract acreage shall revert to the Tribe and shall be deemed no longer contributed acreage pursuant to this Agreement.

"For contract acreage located within a drilling or spacing unit in which a producing well is located, the term of the Agreement shall continue for so long as oil or gas is produced in paying quantities."

Tribal actions prevented him from producing any oil and/or gas for a full year. Appellant bears the burden of proving that the agency decision complained of was erroneous or not supported by evidence. See, e.g., Littleman v. Anadarko Area Director, 24 IBIA 129 (1993); Pikyavit v. Acting Phoenix Area Director, 23 IBIA 4 (1992), and cases cited therein. The Board concludes that appellant has not carried that burden of proof as to arguments 1, 4, and 5. 6/

Appellant's second and third arguments contend that section 11.2 of the Agreement is ambiguous, and that based on its interpretation of the section, BEA tendered payment of $12,800 to the Tribe as "shut-in royalty." Appellant argues that because the Tribe negotiated the check and did not object to BEA's interpretation of section 11.2 until after the time for production had passed, the Tribe should not be permitted to dispute the applicability of section 11.2 to the facts of this case.

Section XI, SHUT IN WELLS, provides:

> 11.1 In the event that the wells completed pursuant to §6.1, or any additional wells, are found to be capable of producing in

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6/ Although appellant might contend that he intended to present such evidence at a hearing, appellant was sent a copy of the Board's regulations on July 29, 1992. Those regulations clearly indicate that review by the Board is on the record unless unusual circumstances exist, which in the Board's opinion, require referral for an evidentiary hearing to resolve a disputed issue of material fact. See, in general, 43 CFR 4.310-.340, and esp. 43 CFR 4.337(a). As the person requesting an evidentiary hearing, appellant bore the responsibility of showing the existence of a controversy concerning a genuine issue of material fact, the resolution of which was necessary for a decision in his appeal. All Materials of Montana, Inc. v. Billings Area Director, 21 IBIA 202, 211-12 (1992). Appellant's unsupported allegations of possible improprieties by the Tribe are not sufficient to warrant referral for an evidentiary hearing.

Giving appellant the benefit of every doubt, it is possible that he is attempting to argue that the Tribal actions constituted interference which rendered performance impossible. Section XVI of the Agreement, Force Majeure, specifies the procedures to be followed "when compliance with any provision of this Agreement is prevented or hindered by * * * unauthorized tribal actions * * * or other conditions or circumstances not within the control of [appellant]."

There is no indication in the administrative record or in appellant's filings that he complied with this section of the Agreement and informed the Tribe that he was suspending operations because of the Tribe's unauthorized actions. The applicability of this section to the suspension of operations was specifically pointed out to appellant in a Sept. 8, 1987, letter from the Tribe. If appellant believed that continuation of operations was rendered impossible by Tribal actions, he should have followed the force majeure procedures at the time of the occurrence. Alleging that such conditions existed after a year of nonproduction is simply too little, too late.

> paying quantities, [appellant] shall within a maximum of three years from the date of completion of said well bring said well into a status of actual production in paying quantities.
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> 11.2 During that period of time in which any well capable of production is shut in, the Tribe and applicable allottees shall be entitled to payment of a proportionate shut in royalty amounting to the sum of Ten and 00/100 Dollars ($10.00) per acre per year.
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> 11.3 It is the understanding of the parties that a gas purchase agreement has not been entered into with any third party for the sale of substances produced from wells to be drilled on contract acreage, and as a result, it is likely that wells located within the contract acreage may be shut in for a substantial portion of the period of time allowed for under §11.1. [Appellant] agrees to make every reasonable effort to enter into such an agreement as soon as practicable, and [appellant] agrees to allow representatives of the Tribe to participate in all negotiations to secure a favorable gas purchase agreement.

Read alone, section 11.2 may appear ambiguous. However, when the section is placed in its proper context, it becomes apparent that the payment of shut-in royalties is authorized only during the period in which a well capable of production may be shut in, i.e., during the 3-year development period described in section 11.1 and referenced in section 11.3. 7/ Further, the Agreement as a whole supports this interpretation. It anticipates relatively rapid development, and provides in several sections that the failure to develop a producing well within the specified time frames will cause the affected acreage to revert to the Tribe or allottee(s), with no liability owed to appellant. Production in paying quantities is clearly necessary to hold the Agreement after the expiration of the 150-day exploration and 3-year development periods. By the time production ceased in December 1990, these periods had expired with respect to the contract acreage at issue here. The Board concludes that section 11.2 did not authorize appellant, after the expiration of the 3-year development period, to shut in a well capable of producing and retain that well through the payment of a "shut-in royalty." 8/

The fact that the Tribe initially negotiated BEA's check is thus not relevant. Appellant contends that the Tribe did not refund the amount paid by BEA until "[a]fter time had passed for actual production," suggesting that the Tribe somehow misled him into believing that the failure to produce

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7/ The intent of section 11.2 might have been clearer had it followed section 11.3, rather than preceding it.

8/ Because the Board has concluded that the Agreement as a whole removes any ambiguity in section 11.2, there is no need to resort to extrinsic evidence to ascertain the intentions of the parties. See, e.g., Schwan v. Aberdeen Area Director, 23 IBIA 10, 15 (1992). Therefore, it does not consider the extrinsic evidence submitted by the Area Director.

was acceptable, at a time when be could have remedied the situation. However, it was not until November 5, 1991, nearly a year after the wells had ceased production, that BEA attempted to pay shut-in royalties. By that time, the Agreement had long since expired. Because appellant had no right after the 3-year development period to retain a well capable of producing through the payment of a "shut-in royalty," the Tribe's negotiation of BEA's check did not prejudice appellant or grant him rights not set forth in the Agreement.

The Board concludes that appellant has not shown that his failure to produce in paying quantities was justified, authorized, or excused.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the June 8, 1992, decision of the Albuquerque Area Director is affirmed.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge